APPEAL NO. 021384
FILED JULY 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 7, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter, beginning January 26, 2002, and ending April 26, 2002. The claimant appeals, arguing that the hearing officer's determination is against the great weight and preponderance of the evidence. The respondent (self-insured) responds urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in dispute was whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the fourth quarter. The parties stipulated that the qualifying period for the fourth quarter began October 13, 2001, and ended January 11, 2002. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The claimant argues that the hearing officer "applied the wrong standard in her analysis of whether or not [the claimant] was entitled to [SIBs]" by explaining that a job search should "begin in the morning and continue throughout each day of the qualifying period." Rule 130.102(e) sets forth a number of factors for the hearing officer to consider in determining whether the claimant made a good faith effort to obtain employment commensurate with her ability to work, including, but not limited to, the number of jobs applied for; the type of jobs applied for; registration with the Texas Workforce Commission; and the amount of time spent in attempting to find employment. The issue in dispute presented a question of fact for the hearing officer to resolve based on the evidence presented. The hearing officer was not persuaded that the claimant's efforts amounted to a good faith effort to obtain employment commensurate with her ability to work. We have reviewed the complained-of determination. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). This is so even though another fact finder might have drawn other inference and reached other conclusions. Salazar, *et al*. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Also, the claimant argues that the hearing officer erred in determining that the claimant's job searches were not within the her physical restrictions because "living in a rural area it is not likely that every single restriction that her doctor might have her on would be compatible with every single job vacancy in the area." The claimant testified that she lived close to other towns and cities where she could apply for jobs. The work status report (TWCC-73) reflects that the claimant was released to work with restrictions on July 18, 2001. The Application for [SIBs] (TWCC-52) for the qualifying period in dispute reflects that the claimant applied for delivery, housekeeping, cashier and waitressing jobs. The evidence sufficiently supports the hearing officer's determination that the claimant "applied for at least one job each week of the qualifying period for the fourth (4th) quarter, but [that] some of the positions for which she made application[s] were not within her physical restrictions." Although the claimant listed 21 job contacts during the qualifying period for the fourth quarter, the hearing officer found from all of the evidence presented that the claimant failed to make a good faith effort to obtain employment commensurate with her ability to work. We have reviewed the complained-of determination. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain, *supra*. Again, another fact finder might have reached other conclusions. Salazar, *supra*. Finally we wish to observe that the panel is in complete agreement with Judge Kelley's well-reasoned concurring opinion.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured government entity)** and the name and address of its registered agent for service of process is

MH
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

While I do not believe that the decision for this particular quarter is necessarily against the great weight and preponderance of the evidence, I write separately to point out that various statements in the generalized discussion of the hearing officer might, if applied as hard-and-fast criteria in another case, lead to reversible error.

Contrary to what the hearing officer states, a good faith job search can and often does include reading the help-wanted advertisements in newspapers or checking websites, and is not restricted solely to the placing of applications. It is the search for actual posted vacancies by such means that can underscore a good faith effort. Such efforts must, of course, be documented, but if documented, cannot be refused consideration by the hearing officer.

There is no requirement in the 1989 Act or rules that a job search "begin in the morning and continue throughout each day." While such effort would be commendable, practical considerations alone show this to be an unrealistic expectation as a norm of good faith. Although several businesses are open on weekends or the mornings, their hiring authorities may not be in attendance. A person who already holds part-time employment, and is seeking full-time employment will not actively search while working for another employer. The available transportation or mobility difficulties that must be considered by the hearing officer in assessing good faith may run exactly opposite to the ability to search morning, noon, and afternoon. The rule requires documentation of a job search during *every week* of the qualifying period, and not during *every day*.

The hearing officer also states that an application "cannot be considered" as having been made in good faith if the injured worker physically cannot perform the duties of the position. This, too, paints with too broad a brush because the physical duties of a position may not be advertised clearly or at all and it may not be until after an application is made that it becomes apparent the job is not in fact within restrictions. See Texas Workers' Compensation Commission Appeal No. 961553, decided September 20, 1996.

Finally, the hearing officer states that refusal of an offered position may disqualify an injured worker for supplemental income benefits (SIBs). However, the manner in which an injured worker may be effectively "sanctioned" for refusing a bona fide offer is set out in Section 408.144(c), through attribution of the offered wage to the claimant, not automatic disqualification. (Although the end result in dollars paid to the claimant might be the same as disqualification, the disqualified quarter would be figured into the 12 consecutive month period that may cause a permanent loss of entitlement to SIBs, Section 408.146(c)).

While the claimant has expressed understandable consternation about some of these observations in the hearing officer's decision, I do not believe that they reflect, in this case, imposition of a higher standard in reviewing the claimant's evidence than the applicable statute and rules allow.

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Susan M. Kelley
Appeals Judge